RECORD AND BRIEFS

Nos. 16-285, 16-300 & 16-307

Supreme Court, U.S.
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In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, ET AL.,
Petitioners,
v.
STEPHEN MORRIS, ET AL.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., ET AL.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth, Seventh, And Ninth Circuits

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IMPACT FUND, AND 30 CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS IN NOS. 16-285 & 16-300 AND PETITIONER IN NO. 16-307

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INTERESTS OF *AMICI CURIAE*[1]

This brief is submitted by the NAACP Legal Defense and Educational Fund, Inc., the Impact Fund, and 30 other non-profit civil rights and legal advocacy organizations.

The **NAACP Legal Defense and Educational Fund, Inc.** (LDF) is a non-profit legal organization that, for more than seven decades, has fought to achieve racial justice and ensure that America fulfills its promise of equality for all. In this Court and other federal and state courts, LDF has litigated numerous class actions, which are particularly effective in facilitating concerted action to secure systemic change. *See, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968). LDF has also appeared as a party and as an *amicus* before this Court in several cases involving arbitration issues. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

The **Impact Fund** is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund has been counsel in numerous civil-rights class actions, including cases challenging employment discrimination, lack of access for persons with disabilities, and violations of fair housing laws.

Additional *amici* are listed in Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

American democracy depends upon our unwavering commitment to equal opportunity. Federal labor law honors that commitment by guaranteeing employees the right to challenge workplace discrimination through concerted activity, including picketing, striking, and group adjudication of workplace rights. Yet mandatory pre-dispute arbitration agreements, which have become increasingly prevalent in the American workplace, now commonly prohibit employees from joining together in *any* combination and in *any* legal forum to vindicate their right to be free from workplace discrimination, and other core statutory rights.[2] By barring every imaginable form of group legal challenge

[2] *Amici*'s arguments directly relate to the arbitration provisions at issue in *NLRB v. Murphy Oil*, No. 16-307 (5th Cir.) and *Ernst & Young LLP v. Morris*, No. 16-300 (9th Cir.). The arbitration provision in *Epic Systems v. Lewis*, No. 16-285 (7th Cir.) excludes "claims alleging discrimination, harassment, or retaliation" from its coverage. *Epic Systems v. Lewis*, Petition at 32a.

to an employer's unlawful workplace practices – from simple joinder to consolidation of claims to collective and class actions – these contractual prohibitions pose a substantial threat to Congress' longstanding goal of eradicating discrimination in the American workplace. Specifically, workers will be precluded from using certain core civil rights legal theories that have been crucial for securing equal opportunity in the workplace. For civil rights, the consequences of permitting unrestrained and ubiquitous use of arbitration clauses in individual employment agreements will be profound.

"Civil rights and class actions have an historic partnership." Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 Ariz. L. Rev. 575, 577 (1997). Landmark class actions and other forms of group litigation have long been essential components of our nation's slow but deliberate progress toward a "more perfect Union." This Court's 1954 decision in *Brown v. Board of Education* is but one example of how concerted action has been the foundation for promoting equal opportunity for all Americans. 347 U.S. 483 (1954). Civil rights concerted actions have been indispensable in reducing discrimination in almost every sphere of American society. When a plaintiff brings a class action under the civil rights laws, "he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered the highest priority." *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 400-02 (1968) (successfully enjoining discrimination against African Americans at a South Carolina restaurant chain).

Concerted actions remain essential to combat persistent discrimination. *See* Hon. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2184 (1989) (hereinafter "Carter, *Federal Rules*") (noting the "special dependence" of civil rights litigation on the device of the class action). Since the passage of the Civil Rights Act of 1964, many of the most significant employment discrimination cases have been brought as concerted actions, and – with few exceptions – could not have been brought or would not have achieved successful results as individual actions. Concerted actions can remedy civil rights violations in circumstances where workers are unlikely to proceed alone, for lack of resources or because of well-documented fear of retaliation. In the employment context, concerted legal actions also serve broader public interests by remedying and deterring civil rights violations and dismantling systemic discrimination in the workplace.

Discrimination claims pursued in concert have enabled workers to expose institution-wide discrimination and have resulted in comprehensive remedial orders that brought into legal compliance the employment practices of some of our country's leading corporations, including Abercrombie & Fitch, Coca-Cola, Comcast, Eastman Kodak, FedEx, Morgan Stanley, Novartis, Sodexho Marriott Services, Sprint, Wal-Mart, and Xerox.[3]

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[3] *See, e.g.*, Order, *Cote v. Wal-Mart Stores, Inc.*, No. 1:15-cv-12945-WGY (D. Mass. May 16, 2017), ECF No. 83 (approving class

The importance of concerted action in the employment context has long been a cornerstone of federal labor law as a matter of both principle and practice. As this Court explained more than 80 years ago in *NLRB*

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settlement on behalf of 1200 current and former employees who were denied spousal health benefits for their same sex spouses); Order and Judgment, *Brand v. Comcast Corp.*, No. 11-cv-8471 (N.D. Ill. June 15, 2016), ECF No. 169 (approving class settlement for 385 African-American technicians alleging a hostile work environment); *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194(CM), 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010) (following trial of class gender and pregnancy discrimination claims on behalf of 6,200 female pharmaceutical sales representatives, settlement approved with detailed programmatic relief and $152 million settlement fund); Stip. & Order, *Davis v. Eastman Kodak Co.*, Nos. 6:04-cv-6098, 6:07-cv-6512 (W.D.N.Y. Sept. 3, 2010), ECF Nos. 350, 27 (approving class settlement on behalf of over 3,000 current and former African-American employees); *Curtis-Bauer v. Morgan Stanley & Co.*, No. 3:06-cv-3903, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008) (approving class settlement on behalf of over 1,300 African-American and Latino financial advisors); *Warren v. Xerox Corp.*, No. 1:01-cv-2909, 2008 WL 4371367 (E.D.N.Y. Sept. 19, 2008) (approving class settlement on behalf of nearly 1,500 African-American sales representatives); *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL, 2007 WL 2694029 (D. Kan. Sept. 11, 2007) (approving settlement of age discrimination collective action for 1700 workers laid off as a result of company's force ranking system); Order, *Satchell v. FedEx Corp.*, Nos. 3:03-cv-2659, 3:03-cv-2878 (N.D. Cal. Aug. 14, 2007), ECF Nos. 780, 324 (approving class settlement on behalf of 20,000 African-American and Latino employees); Consent Decree, *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, Nos. 3:03-cv-2817, 3:04-cv-4730, 3:04-cv-4731 (N.D. Cal. Apr. 15, 2005), ECF Nos. 141, 16, 20 (approving consent decree settling claims of systemic discrimination against Latino, African-American, Asian-American, and female applicants and employees); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) (approving class settlement on behalf of 2,200 current and former African-American employees).

v. Jones & Laughlin Steel Corp., a single employee "was helpless in dealing with an employer . . . he was dependent ordinarily on his daily wage for the maintenance of himself and his family; . . . if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment." 301 U.S. 1, 33 (1937). In enacting § 7 of the Nat'l Labor Relations Act, 29 U.S.C.A. §§ 151 *et seq.*, and § 2 of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101 *et seq.*, before that, Congress took direct steps to help equalize the bargaining power of employers and their employees by guaranteeing employees the right to band together in confronting an employer. *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 834 (1984). This statutorily protected right to proceed in concert furthers those same goals by ensuring meaningful access to a neutral dispute resolution process that can provide a complete and effective remedy for unlawful employer conduct directed at similarly situated employees. Employment contracts that prohibit concerted legal actions destroy that equilibrium and hazard America's hard-won progress towards equality.

Forcing workers to proceed alone creates unique dangers for civil rights enforcement. Such restrictions effectively foreclose the use of two crucial methods for proving employment discrimination: disparate impact and pattern-or-practice theories. Restrictions on concerted actions also limit the availability of systemic injunctions, a tool that has been critical to the eradication of discrimination in the workplace. If employers

can preclude workers from acting together in every forum, they can – and will – effectively extinguish the civil rights claims of the most vulnerable members of the workforce.

ARGUMENT

I. CONCERTED ACTIONS HAVE HELPED TO ENSURE OUR NATION'S PROGRESS TOWARD EQUAL EMPLOYMENT OPPORTUNITY.

For decades, as both this Court and Congress have recognized, concerted actions in federal court have spurred progress toward equal opportunity and advanced our federal antidiscrimination laws' broad remedial "purpose[] . . . of eradicating discrimination throughout the economy." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 405-06 (1975). This progress would not have occurred if, instead of banding together to pursue claims in open court, employees were forced into individual, confidential dispute-resolution proceedings.

Concerted actions have been instrumental to the development of employment discrimination jurisprudence. For example, the transformative decision of *Griggs v. Duke Power Co.* – which established that Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000(e) *et seq.*, does not tolerate facially-neutral employment practices that operate as discriminatory barriers to employment – was brought as a class action

by a group of African-American power plant employees. 401 U.S. 424, 426 (1971). Similarly, this Court's decision in *Albemarle Paper* – a class case challenging a racially discriminatory seniority system and employment testing – established a presumption that backpay should be awarded in employment discrimination cases; that holding created a powerful economic incentive for employers to comply with Title VII. 422 U.S. at 405. These cases and others would not have been possible if forced arbitration clauses bound the plaintiff employees.

Concerted actions have also diversified the American workplace by successfully challenging a wide range of discriminatory employment rules and practices, many based on outdated stereotypes. Such cases have established that:

- Women cannot be categorically excluded from jobs that may harm their reproductive capacity. *Int'l Union, United Auto. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).
- Flight engineers cannot be forced to retire at age 60. *W. Air Lines v. Criswell*, 472 U.S. 400 (1985).
- Men can apply to work as flight attendants. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

- Women cannot be excluded from prison guard jobs by arbitrary height and weight requirements. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).[4]

Other examples of concerted legal action similarly illustrate the power of such cases as a mechanism for ending workplace discrimination. In *McClain v. Lufkin Industries, Inc.*, the Fifth Circuit affirmed the district court's holding that a large Texas manufacturing plant's "practice of delegating subjective decision-making authority to its white managers with respect to . . . promotions resulted in a disparate impact on [a class of over 700] black employees in violation of Title VII." 519 F.3d 264, 272 (5th Cir. 2008). Among the district court's findings was that, because of the company's practices, "white employees ha[d] a significant advantage in gaining the skills and abilities needed to qualify them for promotion . . . [whereas] Black employees [were] more likely to be placed in dead-end positions and left to seek training on their own." *McClain v. Lufkin Indus.*, No. 9:97-cv-63, 2005 U.S. Dist. LEXIS 42545, at *32-33 (E.D. Tex. Jan. 13, 2005), *aff'd in relevant part*, 519 F.3d 264 (5th Cir. 2008). Similarly, in *Haynes v. Shoney's, Inc.*, the district court certified a class and ultimately issued a ruling that remedied "an overt policy of blatant racial discrimination and retaliation" at the Shoney's restaurant chain that was "developed and directed" by "top Shoney's

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[4] *Amici*'s Appendix B lists 118 concerted legal actions that have enforced civil rights protections in the workplace.

management" and "implemented by all-white supervisory and management personnel." No. 3:89-cv-30093, 1992 WL 752127, at *2 (N.D. Fla. June 22, 1992); *see also Haynes v. Shoney's, Inc.*, No. 3:89-cv-30093, 1993 WL 19915, at *6-7 (N.D. Fla. Jan. 25, 1993) (approving consent decree requiring, *inter alia*, $105 million in relief to class members and significant corporation-wide reforms). As this Court has explained, "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs." *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977).

Consistent with these cases, Congress has recognized that concerted actions are integral to the enforcement of civil rights laws. In 1972, when Title VII was amended by the Equal Employment Opportunity Act, proposals to abolish class actions or to restrict their scope in Title VII cases were rejected. As the Senate Report stated: "The committee agrees with the courts that Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII." S. Rep. No. 92-415, at 27 (1971), *reprinted in* Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare, *Legislative History of the Equal Opportunity Act of 1972*, at 436 (1972). Both the Equal Pay Act, 29 U.S.C.A. § 206(d), and the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621 *et seq.*, incorporate the enforcement provisions of 29 U.S.C.A. § 216(b), which expressly authorize "[a]n action to . . . be maintained . . . by any one or more employees for and

in behalf of himself or themselves and other employees similarly situated." This Court has recognized that in "[t]he ADEA, through incorporation of § 216(b) [of the FLSA] . . . Congress has stated its policy that . . . plaintiffs should have the opportunity to proceed collectively." *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

II. CONCERTED ACTIONS ARE UNIQUELY EFFECTIVE IN REMEDYING AND DETERRING SYSTEMIC EMPLOYMENT DISCRIMINATION.

A. Concerted Actions Promote Employee Collaboration.

For individuals who have experienced discrimination and other civil rights violations, "association for litigation may be the most effective form of political association." *NAACP v. Button*, 371 U.S. 415, 431 (1963); *accord In re Primus*, 436 U.S. 412, 423-26 (1978). For example, a sense of shared commitment among African-American workers at Duke Power in North Carolina helped to catalyze the class action that led to this Court's landmark decision in *Griggs*. 401 U.S. at 431; *see also* Robert Samuel Smith, *Race, Labor & Civil Rights: Griggs versus Duke Power and the Struggle for Equal Employment Opportunity* 84-90, 113, 177-81 (David Goldfield ed., La. State Univ. Press 2008).

The ability of workers to share their experiences with one another and take concerted legal action has also helped to facilitate the eradication of hostile and

unlawful harassment in some workplaces. As this Court has observed, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at *all* [*of*] *the circumstances.*" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (emphasis added). This inquiry may be both complex and subtle because "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998).

As such, victims of harassment frequently join with their co-workers to challenge abusive environments in multi-plaintiff, collective, or class actions.[5]

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[5] *See, e.g.*, *Ellis v. Houston*, 742 F.3d 307 (8th Cir. 2014) (five African-American correctional officers challenged pattern of racial harassment by supervisor in Nebraska penitentiary); *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011) (six African-American steel production plant workers unlawfully subjected to racially hostile work environment); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013-15 (8th Cir. 1988) (three female "flag persons" proved sexually hostile environment perpetrated by male road construction crew); *Brand v. Comcast Corp.*, 302 F.R.D. 201, 207 (N.D. Ill. 2014) (challenge to racially hostile environment in telecommunications facility); *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007) (female sales employees alleged hostile work environment and other gender based claims against national pharmaceutical company); *Smith v. Nike Retail Servs.*, 234 F.R.D. 648 (N.D. Ill. 2006) (18 African-American retail workers alleged racially hostile work environment on behalf of class employed in Chicago area stores); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 879-87 (D. Minn. 1993) (class of female workers in taconite mining facility established that "sexualized" work environment was objectively hostile); *Sellars v. CRST Expedited, Inc.*, No. C15-117, 2017

The mutually corroborating testimony of co-workers can be critical to plaintiffs' ability to meet their burden of proving that the alleged harassing conduct was not isolated or sporadic,[6] can illuminate the context of such behavior,[7] and can establish why the conduct should be deemed objectively harassing to a reasonable person.[8] For example, if a manager regularly propositions female subordinates behind closed doors, joint legal action can empower victims to bring the harassing conduct to light and overcome a "he said/she said" defense that is often fatal in individual actions.

When workers act together to expose and prove discrimination or harassment, their joint efforts create

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WL 1193730 (N.D. Iowa 2017) (group of female truck driver trainees challenging failure to prevent sexual harassment by male lead drivers during long-haul road trips).

[6] *Ellis*, 742 F.3d at 322 ("evidence offered both by the black officers and by other witnesses indicated that racist comments were made without objection in a group setting on a near daily basis"); *Jenson*, 824 F. Supp. at 879 n.78 ("Numerous witnesses testified about the presence of visual, verbal and physical references to sex and sexual relations. . . . the uniformity with which they discussed the sexualized nature of the work place convinces the Court that the work place was sexualized").

[7] *Ellis*, 742 F.3d at 320 (underscoring the importance of "context" in evaluating the objective severity of daily racial remarks in case brought by five African-American corrections officers).

[8] *Jackson v. Quanex Corp.*, 191 F.3d 647, 661 (6th Cir. 1999) (reversing directed verdict for employer where court excluded testimony of African-American co-workers that "certainly mattered" as to whether the workplace was "objectively hostile"); *Sandoval v. Am. Bldg. Maint. Indus.*, 578 F.3d 787, 802 (8th Cir. 2009) (evidence of other incidents of harassment is "highly probative of the type of workplace environment [plaintiff] was subjected to").

economies of scale. This Court has repeatedly recognized the importance of concerted actions in providing legal redress for inequities that may be too time- and resource-intensive to realistically challenge through isolated individual claims. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Hoffman-La Roche*, 493 U.S. at 170; *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Without the right to challenge discrimination through concerted legal action, many meritorious civil rights claims will never be pursued at all, for reasons unrelated to their merits. Especially for low-wage workers, the amount of potential recovery in an employment case is often so small, and the costs of litigation so high, that pursuing an individual claim would be economically irrational. *See Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 4 (D.D.C. 2002) (noting in suit alleging sex discrimination in pay, "[w]ithout class certification, there could be . . . a significant number of individuals deprived of their day in court because they are otherwise unable to afford independent representation."). Many workers also lack knowledge about the full range of protections afforded by anti-discrimination laws or which particular employer practices or policies run afoul of those laws, and cannot even begin to address any violation of those rights absent notice from co-workers or a court that a group legal challenge has been initiated. *See Hoffmann-La Roche Inc.*, 493 U.S. at 170 ("These benefits . . . depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate").

Concerted actions, by contrast, allow multiple plaintiffs to share the costs and burdens of litigation, which is often key to obtaining redress. *See, e.g., Duke v. Univ. of Tex. at El Paso*, 729 F.2d 994, 997 (5th Cir. 1984) (reversing judgment against a discrimination plaintiff to permit broad discovery in support of a class certification motion). Such actions can also trigger a broader inquiry into discrimination, yielding company-wide evidence that an individual plaintiff is less likely to uncover. *See* Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 Ohio N.U. L. Rev. 621, 631 (2011).

B. Concerted Actions Allay Fears and Reduce the Risks of Retaliation.

Concerted actions also help to ameliorate legitimate fears of retaliation, which would otherwise discourage individuals from proceeding alone. Reflecting on his experience as a civil rights litigator, Judge Robert Carter observed that in cases "seeking to vindicate novel rights in the face of majoritarian hostility, the very ability to proceed required the institution of a class action" because a "lone plaintiff" may be "extremely vulnerable to the pressure of intimidation." Carter, *Federal Rules*, at 2186; *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (finding class certification requirements satisfied where "class members still employed by the [defendant] might be reluctant to file individually for fear of workplace retaliation").

Unlike plaintiffs in most consumer or securities cases, workers who press claims for employment discrimination are uniquely vulnerable to retaliation. Consequently, many victims of employment discrimination are deterred from vindicating their rights, for fear of losing the weekly paycheck by which they provide for their families. "A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 73 (2006). While the law provides a potential remedy for those who can ultimately prove retaliation, the prospect of compensation sometime in the future is cold comfort when an employee is suspended or fired for asserting his or her rights. *See id.* ("[A]n indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay."). Moreover, retaliation in the workplace can be subtle, indirect, and difficult if not impossible to prove, making the threat of adverse consequences all the more chilling. Because of their economic vulnerability, low-wage workers face significant obstacles when they seek to vindicate their rights, including particularly pernicious forms of retaliation.

Concerted legal action permits workers to overcome these fears and stand together to assert their rights. "Employment discrimination suits seeking injunctive relief are frequently managed as class actions due to distinctive difficulties with joinder. Prospective plaintiffs may refuse to identify themselves for fear of harassment or retaliation by the employer." *McClain v.*

Lufkin Indus., Inc., 187 F.R.D. 267, 278 (E.D. Tex. 1999). A worker who must stand alone to confront her employer and challenge a violation of her civil rights will be far less likely to do so if she must bear that risk alone. *See, e.g.*, *Mullen*, 186 F.3d at 625 (Casino workers "might be unwilling to sue individually or join a suit for fear of retaliation at their jobs.").

C. Concerted Actions Ensure Corporate Transparency and Promote Accountability.

Employers are less likely to be held accountable for discrimination when challenged on an individual basis, especially when strict confidentiality provisions are in place, as they are in many employment arbitration agreements. *See* Malveaux, *supra*, at 631. The resulting harms to victimized employees and to the congressional purposes and policies underlying federal workplace protections are enormous. Individual employees are often unaware when their rights are violated, either because their employer has successfully concealed the discrimination or because it occurs in patterns that are not recognizable to individual employees. For example, discrimination that results in pay disparities is often difficult to detect because pay decisions are made confidentially and many employers discourage or outright prohibit employees from discussing salary. *See* U.S. Dep't of Labor, Women's Bureau, Fact Sheet, Pay Secrecy, 1 (Aug. 2014), https://www.dol.gov/wb/media/pay_secrecy.pdf ("In 2010, nearly half of all workers nationally reported that they were

either contractually forbidden or strongly discouraged from discussing their pay with their colleagues."). Confidential arbitration decisions also cannot provide guidance to law-abiding employers who want to comply with civil rights laws in their personnel decisions. *See* AAA Employment Arbitration Rules and Mediation Procedures, Rule 23 (2009) ("The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.").[9]

The exposure that accompanies concerted legal action also helps to deter future wrongdoing by signaling to the market that employment discrimination is harmful economically and reputationally to the corporate brand. A federal district court recognized these benefits when it approved an "imaginative" nationwide class settlement to resolve allegations that Texaco pervasively discriminated against African-American

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[9] In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31-32 (1991), a case brought by older workers under the ADEA, the Court considered whether arbitration would lead to "a stifling of the development of the law" under circumstances far different from those here. There, the rules at issue allowed for collective proceedings and *required* all arbitration awards to be in writing and made public, with a summary of the award and issues in controversy. *Id.* But in the consolidated cases here, one of the three arbitration clauses requires that arbitration proceedings, "including any award made, shall be confidential[.]" *Ernst & Young LLP v. Morris*, No. 16-300, JA 46. The other two invoke the American Arbitration Association's rules, for employment arbitration, quoted above, which mandate confidentiality. *NLRB v. Murphy Oil*, No. 16-307, JA at 8, *Epic Systems Corp. v. Lewis*, No. 16-285, Petition at 33a.

employees and concealed evidence pertinent to the litigation. *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 189-93, 198 (S.D.N.Y. 1997). The court noted that the case "captured national attention" and "may well have important ameliorative impact not only at Texaco but in the corporate context as a whole." *Id.* at 189, 197-98.

III. MOST WORKERS CANNOT USE KEY CIVIL RIGHTS LEGAL THEORIES OR OBTAIN BROAD INJUNCTIVE RELIEF IN THEIR INDIVIDUAL ACTIONS.

Concerted actions are essential to remedying employment discrimination, and much important civil rights jurisprudence has developed in the context of this group paradigm. Individualized actions, by contrast, are poorly equipped to address pervasive and entrenched discrimination. They preclude workers from using three major tools for identifying and remedying workplace discrimination.

A. Disparate Impact Theory

Disparate impact theory – a cornerstone of equal employment jurisprudence for more than four decades – targets facially neutral workplace practices that disproportionately burden members of a protected group without legal justification. In addition to Title VII, employment discrimination claims under the Americans

with Disabilities Act, *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), and the Age Discrimination in Employment Act, *Smith v. City of Jackson*, 544 U.S. 228 (2005), may also use disparate impact analysis.

Disparate impact cases have played a powerful role in making employment opportunities available to members of groups unjustifiably excluded by archaic employment rules, tests unrelated to job performance, and subjective criteria used by public and private employers.[10] The disparate impact theory of discrimination continues to be of vital importance today.[11]

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[10] *See, e.g.*, *Dothard*, 433 U.S. at 331-32 (striking down Alabama's height and weight requirements for correctional counselors that disproportionately excluded women and were not job-related); *Albemarle Paper Co.*, 422 U.S. at 405 (successful challenge to job seniority rules and employment tests that locked African-American workers into lower paying positions in paper mill); *Rowe v. GM Corp.*, 457 F.2d 348 (5th Cir. 1972) (court enjoined subjective transfer/promotion system at auto assembly plant which resulted in disparate impact on African-American employees).

[11] *See, e.g.*, *Ernst v. City of Chicago*, 837 F.3d 788, 805 (7th Cir. 2016) (female applicants for paramedic positions proved that physical abilities test had a disparate impact that was not job related); *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 117 (4th Cir. 2013) (female store managers may properly challenge subjective compensation policy under disparate impact theory); *Houser v. Pritzker*, 28 F. Supp. 3d 222 (S.D.N.Y. 2014) (challenge by Black and Latino applicants to use of arrest records as screening device for temporary U.S. census positions); *McReynolds v. Merrill Lynch*, 672 F.3d 482, 491 (7th Cir. 2012) (disparate impact challenge to account distribution and teaming policies that adversely affected African-American brokers); *United States v. City of New York*, 637

Disparate impact claims are "typically" brought as class actions, 1 Lindemann, Grossman & Weirich, Employment Discrimination Law 3-3 (5th ed. 2012) (hereinafter "Lindemann, Empl. Discrim. Law"), or by groups of workers, *see, e.g.*, *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012); *Maldonado v. City of Altus*, 433 F.3d 1294, 1303-07 (10th Cir. 2006). Disparate impact claims for a single individual are very rare, and are rarely successful.[12] As the Tenth Circuit long ago observed, "discriminatory impact cannot be established where you have just one isolated decision." *Coe v. Yellow Freight Sys.*, 646 F.2d 444, 451 (10th Cir. 1981).

F. Supp. 2d 77, 131-32 (E.D.N.Y. 2009) (invalidating fire department's written examinations that had an unjustified disparate impact on African-American and Latino applicants).

[12] *See, e.g.*, *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1041 (2d Cir. 1993) (female plaintiff's comparison using seven male employees insufficient to meet statistical burden to establish disparate impact); *Young v. Covington & Burling LLP*, 846 F. Supp. 2d 141, 160-61 (D.D.C. 2012) (plaintiff's statistical evidence failed to demonstrate that law firm promotion policy had a disparate impact on African Americans); *Hankins v. Best Buy Co.*, No. 10-cv-4508, 2011 WL 6016233, at *8 (N.D. Ill. Dec. 2, 2011) (individual disparate impact claim dismissed because the "complaint must also allege that individuals other than the plaintiff were affected by the facially neutral policy"); *Coopersmith v. Roudebush*, 517 F.2d 818, 820-21 (D.C. Cir. 1975) (single plaintiff failed to demonstrate that legal experience requirement had disparate impact). *But see Gonzales v. City of New Braunfels*, 176 F.3d 834, 839 n.26 (5th Cir. 1999) ("In the ADA context, a plaintiff may satisfy the second prong of his prima facie case by demonstrating an adverse impact on himself rather than on an entire group.").

The evidence in disparate impact cases "usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). This Court has underscored the demanding nature of the necessary statistical proof, as well as the need to establish a causal link between the disparity and the challenged employment practice. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-59 (1989); *Watson*, 487 U.S. at 993-99; *see also Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101-02 (2008).

For this reason, broad discovery of workforce data is essential for plaintiffs to meet their burden in a disparate impact case, particularly since pertinent information is generally within the exclusive control of the defendant. This Court has recognized this need, and has underscored that "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." *Wards Cove*, 490 U.S. at 657 (addressing the suggestion that the Title VII disparate impact causation requirement was "unduly burdensome"). The scope of discovery necessary to generate these statistical analyses is generally not available in individual actions. *See, e.g.*, *Woodward v. Emulex Corp.*, 714 F.3d 632, 636 (1st Cir. 2013) (in individual age discrimination action, no abuse of discretion when discovery limited to 21 sales workers); *see generally* 2 Lindemann, Empl. Discrim. Law at 24-25 ("Different discovery rules may apply in class actions, as a class suit by definition involves persons and circumstances beyond the particular named plaintiff.").

Even where discovery is available in an individual proceeding, when analyzing a single employment decision there is a significant risk that the "relevant data base [may be] too small to permit any meaningful statistical analysis." *Watson*, 487 U.S. at 1000; *see, e.g.*, *Tyler v. Univ. of Ark. Bd. of Trs.*, 628 F.3d 980, 990 (8th Cir. 2011) (sample of six job applicants too small for meaningful statistical analysis); 2 Lindemann, *supra*, at 35-75 ("Courts have recognized that statistical evidence often is unreliable when the sample size is small."). Put simply, individuals who are forced to proceed alone will have a hard time making out a disparate impact claim. *See* Elizabeth Tippett, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 Hofstra Lab. & Emp. L.J. 433, 443-44 (2012) ("Although disparate impact claims are available to individual plaintiffs, such claims are rarely successful. This is largely a function of the evidentiary rigors of a disparate impact claim, consisting of aggregate statistics showing that an employer's facially neutral practices had a disproportionately adverse impact on a protected group.").

B. Pattern or Practice Theory

Individualized adjudication is similarly not compatible with the pattern-or-practice method of proof. A distinctive feature of employment discrimination jurisprudence, pattern-or-practice claims have been recognized as an essential tool in combating pervasive workplace discrimination and providing "make whole

relief" to victims. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977) (observing the necessity of pattern-or-practice litigation to address discrimination that is "repeated, routine or of a generalized nature"); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984) (noting that the pattern-or-practice model is "essential if the purposes of Title VII [are] to be achieved"). This Court reaffirmed the availability of the *Teamsters* pattern-or-practice method of proof in class action cases in *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 n.7 (2011).

Pattern-or-practice claims are grounded in this Court's recognition that "[i]n many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." *Teamsters*, 431 U.S. at 339-40 n.20 (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971)). But numerous circuits have held that the pattern-or-practice method of proof is not available in individual or multi-plaintiff cases. *See, e.g., Chin*, 685 F.3d 135; *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 967-69 (11th Cir. 2008); *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565 (6th Cir. 2004); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

The pattern-or-practice framework not only allows, but requires, courts to step back and assess the universe of an employer's actions as a whole. Only through this broader lens can widespread discrimination be uncovered and evaluated. In individual

adjudication, however, workers are less able to avail themselves of this tool.

C. Systemic Injunctive Relief

Systemic injunctive relief – another critical tool for dismantling discriminatory conditions – is also ordinarily unavailable in individual cases. Federal Rule of Civil Procedure 23 provides the vehicle for a generally applicable and efficient class-wide remedy, resulting in cessation of the discriminatory practice and, where appropriate, additional equitable remedies for class members. However, absent class certification, courts often refrain from granting relief that extends beyond the harms suffered by the individual plaintiffs.

This Court has held that "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an *individual suit*, such broad relief is rarely justified."); *Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (injunction can apply only to the named plaintiff until class is certified); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 733 (5th Cir. 1977) (in ADEA case for individual termination, "nationwide or companywide injunction is appropriate only when the facts indicate a company policy or practice in violation of the statute").

In *Lowery v. Circuit City Stores, Inc.*, a unanimous jury found that Circuit City had engaged in a pattern or practice of racial discrimination, and the district court ordered broad injunctive relief, including the creation of new procedures to ensure nondiscriminatory promotion. 158 F.3d at 761. However, on appeal, the Fourth Circuit held that because the district court had declined to certify a class, the plaintiffs could not use evidence of systematic discrimination under the *Teamsters* framework to prove instances of individual discrimination. *Id.* (citing *Teamsters*, 431 U.S. at 324). Accordingly, the court granted relief to one of the named plaintiffs, but vacated all other equitable relief, including an injunction requiring the employer to promote employees "without regard to their race." *Lowery*, 158 F.3d at 766-67. The lack of class certification forced the court to disregard a finding of pervasive discrimination, thwarting the plaintiffs' effort to fully vindicate the purposes of Title VII. *Id.* at 766.

* * *

Concerted actions in federal courts have established key legal precedents essential to our nation's progress toward equal opportunity. These precedents give full meaning to our antidiscrimination statutes and provide clarity for employers who want to comply with the law. As this Court has recognized, the legislative purposes that animate our civil rights statutes require "the principled application of standards consistent with those purposes," *Albemarle*, 422 U.S. at 417, and "[i]mportant national goals would be frustrated by a regime of discretion that 'produce[d] different results

for breaches of duty in situations that cannot be differentiated in policy,'" *id.* (quoting *Moragne v. States Marine Lines*, 398 U.S. 375, 405 (1970)). Allowing mandatory individual arbitration to displace the federally-guaranteed right to concerted legal action would create just such a regime. It would also deprive most employees of the kind of evidence that is necessary to challenge widespread, institutional discrimination and would make it difficult or impossible to secure broad-based injunctive relief. Under such a piecemeal regime, workers would be far less effective in removing arbitrary and invidious discrimination from the workplace.

CONCLUSION

For the foregoing reasons, the NLRB's and employees' positions should be accepted and the rulings of the Seventh and Ninth Circuits should be affirmed, while the Fifth Circuit's ruling should be reversed.

Respectfully submitted,

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APPENDIX A
LIST OF ADDITIONAL AMICI

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect the financial security, health, and well-being of older persons. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals age fifty and older secure the essentials. AARP and AARP Foundation combat age and disability-based employment discrimination against older workers, including through participation as amici curiae in state and federal courts. *See e.g.*, *Tyson Foods, Inc. v Bouaphakeo*, 136 S. Ct. 1036 (2016); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005); *Smith v. City of Jackson*, 544 U.S. 228 (2005).

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with over 1.6 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the American Civil Liberties Union has appeared in numerous cases before this Court, both as counsel representing parties and as amicus curiae. The ACLU and its state affiliates advance the cause of civil liberties and civil rights through advocacy and litigation, including class action litigation, lawsuits on behalf of multiple plaintiffs, and other collective legal actions. The ACLU has served and is

currently serving as counsel in numerous class action lawsuits that have been critical to obtaining redress for constitutional violations and ensuring that federal and state laws and government policies comport with the Constitution.

Asian Americans Advancing Justice – Asian Law Caucus (ALC) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. ALC is part of a national affiliation of Asian American civil rights groups, with offices in Los Angeles, Chicago, Washington DC, and Atlanta. ALC's advocacy includes legal counseling, direct services, and class-action litigation for low-wage immigrant workers facing a wide range of workplace issues, including race and national origin discrimination, retaliation, and wage and hour problems. ALC also regularly provides representation for workers organizing collectively to change and improve their workplace conditions.

Asian Americans Advancing Justice – Los Angeles (Advancing Justice-LA) is the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (NHPI). Advancing Justice-LA serves more than 15,000 individuals every year, including Asian Americans and NHPIs who lack effective access to the courts. Through direct services, impact litigation, policy advocacy and capacity building, Advancing Justice-LA focuses on vulnerable members of Asian American and NHPI communities, while also building a strong voice

for civil rights and social justice. Advancing Justice-LA has a long history of working to ensure that members of our communities have effective access to courts. We have represented vulnerable members of our communities in federal courts on a broad range of issues, including language rights and language access, workers' rights, consumer protection, education rights, housing rights, voting rights, health care, and public benefits, among others.

The **California Women's Law Center (CWLC)** is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls. CWLC works to ensure, through systemic change, that life opportunities for women and girls are free from unjust social, economic, and political constraints. CWLC acknowledges the importance of class action litigation to effecting widespread change, and has acted as counsel in a number of civil rights class actions, including cases challenging unfair educational opportunities for female students at K-12 schools under Title IX.

The **Center for Reproductive Rights** is a global advocacy organization that uses the law to advance reproductive freedom, an essential predicate of gender equality and full participation in social and economic life. In the United States, the Center's work focuses on protecting and expanding the constitutional, statutory, and human rights that guarantee reproductive autonomy, which includes the right to make decisions about family life free from discrimination in the workplace or elsewhere. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in

the U.S. concerning reproductive rights, in both state and federal courts. As a rights-based organization, the Center has a vital interest in ensuring that individuals and groups endeavoring to exercise their rights have robust tools to achieve redress in the courts, including the ability to seek class and systemic relief.

Since 1969, **Centro Legal de la Raza (Centro Legal)** has provided legal aid services to low-income, predominantly Spanish-speaking residents of the San Francisco Bay Area. Centro Legal assists several thousand clients annually, including numerous class actions on behalf of immigrant and other low-income workers. Centro Legal therefore has a significant interest in protecting concerted activity by workers to address workplace violations.

The **Civil Rights Education and Enforcement Center (CREEC)** is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination in employment. CREEC's efforts to defend human and civil rights extend to all walks of life, and CREEC and its members have an interest in ensuring that our nation's civil rights laws can be vigorously and effectively enforced through individual and collective action.

Disability Rights Advocates (DRA) is a nonprofit public interest legal center that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. With offices in Berkeley, California and

New York, New York, DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, technology and housing. In *Bates v. UPS*, DRA represented a nationwide class of UPS employees and applicants with hearing loss who had been categorically excluded from certain positions as a result of the company's use of the Department of Transportation hearing standard as a threshold qualification for driving vehicles weighing 10,000 pounds or less. DRA cofounder Laurence W. Paradis successfully argued the case on appeal to the Ninth Circuit.

The **Disability Rights Education & Defense Fund (DREDF)** is a national nonprofit law and policy organization dedicated to protecting and advancing the civil rights of people with disabilities. Based in Berkeley, California, DREDF has remained board- and staff-led by people with disabilities since its founding in 1979. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws. As part of its mission, DREDF works to ensure that people with disabilities have the legal protections, including effective legal remedies, necessary to vindicate their right to be free from discrimination. The ADA and other disability civil rights laws build on and explicitly incorporate the expansive remedies of other statutory nondiscrimination protections. DREDF and the disability community it represents thus have an interest in the issues presented by this case.

The **Equal Justice Society (EJS)** is transforming the nation's consciousness on race through law, social science, and the arts. A national legal organization focused on restoring constitutional safeguards against discrimination, EJS's goal is to help achieve a society where race is no longer a barrier to opportunity. Specifically, EJS is working to fully restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, which guarantees all citizens receive equal treatment under the law. We use a three-pronged approach to accomplish these goals, combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies. Our legal strategy aims to broaden conceptions of present-day discrimination to include unconscious and structural bias by using cognitive science, structural analysis, and real-life experience.

Founded in 1974, **Equal Rights Advocates (ERA)** is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. ERA has litigated class action and other high-impact cases related gender discrimination and civil rights, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). ERA has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of anti-discrimination laws, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington*

Industries v. Ellerth, 524 U.S. 742 (1998); and *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006). Over the course of its forty-year history, ERA has frequently advocated on behalf of women working in male-dominated industries who have suffered egregious discrimination through both facially discriminatory and facially neutral policies and practices. ERA has a strong interest in ensuring that women retain the ability to fairly combat discrimination in the workplace.

Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community.

Justice in Aging's principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of legal aid attorneys and other local advocates, we seek to ensure the health and economic security of older adults with limited income and resources. Since 1972, the Justice in Aging (formerly the National Senior Citizens Law Center) has worked to promote the independence and well-being of low-income elderly and persons with disabilities, especially women, people of color, and other disadvantaged minorities. We work tirelessly to preserve and strengthen Medicaid, Medicare, Social

Security and SSI, benefits programs that allow low-income older adults to live with dignity and independence. In addition, we seek to ensure their access to the courts and to keep the courts open for justice.

Formed in 1973, **Lambda Legal Defense and Education Fund, Inc.** is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel of record or amicus curiae in some of the most important cases regarding the rights of LGBT people and people living with HIV. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996). Of particular relevance here, for many years, Lambda Legal has been actively litigating the issue of Title VII's application to claims of discrimination on the basis of sexual orientation or gender identity. *See, e.g.*, *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Evans v. Georgia Regl. Hosp.*, 850 F.3d 1248 (11th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). Based on this experience, Lambda Legal has a strong interest in defending litigants' access to Article III courts, an essential venue for adjudicating unsettled questions regarding the application of federal civil

rights laws, particularly for people of color, the financially insecure, and other socially and economically marginalized groups.

LatinoJustice PRLDEF is a national not for profit civil rights legal defense fund that engages in litigation, advocacy, and education to defend the constitutional rights and the equal protection of all Latinos under the law. Since being founded in 1972 as the Puerto Rican Legal Defense & Education Fund, we have championed an equitable society through advancing Latinx civil engagement, cultivating new Latinx community leaders, and engaging in and supporting law reform impact litigation efforts across the country that champion civil rights and equality in the areas of criminal justice, education, employment, immigrants' rights, language rights, redistricting and voting rights.

The **Law Foundation of Silicon Valley** is a nonprofit agency in San José, California, that provides free legal services to Santa Clara County residents in need in the areas of safe and affordable housing, stable homes for abused and neglected children, and addressing a number of other issues including discrimination, domestic violence, disability rights, and human trafficking. The mission of the Law Foundation is to advance the rights of under-represented individuals and families in our diverse community through legal services, strategic advocacy, and educational outreach. The Law Foundation has litigated numerous civil rights class action cases to advance the cause of justice for our clients. *See, e.g.*, *Lewis et al. v. Silvertree Mohave Homeowners' Ass'n et al.*, No. C 16-03581 WHA (N.D.

Cal. filed Jun. 24, 2016); *Huynh et al. v. Harasz et al.*, 14-CV-02367-LHK (N.D. Cal. filed May 22, 2014); *Hopkins et al. v. Flores et al.*, No. 1-05-CV-035647 (S.C.C. Super. Ct. filed Feb. 15, 2005); *Rodriguez, et al. v. Santa Clara Cnty. Dep't of Social Serv.*, No. C-97-20934 JW (N.D. Cal. filed Oct. 27, 1997); and *Lopez, et al. v. Washington Mutual Bank, FA*, 302 F.3d 900 (9th Cir. 2002).

The **Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee)** is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to mobilize the private bar in vindicating the civil rights of African Americans and other racial and ethnic minorities. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities and other disadvantaged populations. Since the 1960s, the Lawyers' Committee has relied on class and concerted actions under the Civil Rights Act of 1964 and other federal and state statutes as essential tools for combating unlawful discrimination in the workplace. The Lawyers' Committee has been involved in cases before the United States Supreme Court involving the interplay of arbitration clauses and the exercise of rights guaranteed by civil rights laws prohibiting employment discrimination, including serving as *amicus curiae* in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen S.A. v. Animalfeeds International*, 559 U.S. 662 (2010); and *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

The **Leadership Conference on Civil and Human Rights (The Leadership Conference)** is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, we have participated as an amicus party in cases of public importance that will affect the civil and human rights of many individuals, and, in particular, the interests of constituencies in The Leadership Conference coalition.

Legal Aid at Work (LAAW), formerly the Legal Aid Society – Employment Law Center, represents low-wage workers facing a range of workplace issues, including unpaid wages, denials of family and medical leave and accommodation, wrongful termination, harassment, retaliation, and discrimination on the basis of race, national origin, immigration status, language, gender, sexual orientation, or disability. LAAW's clients – women, people of color, persons with disabilities, immigrants, and others in low-paying jobs – suffer discrimination, wage and hour violations, unlawful termination, harassment, threats to health and safety, and other illegal on-the-job practices. LAAW litigates law

reform and collective and class actions to change policies and practices that hinder access to equal employment opportunities. LAAW has litigated a number of cases under Title IX of the Education Amendments of 1972, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, as well as the Fair Labor Standards Act, among others. Some of LAAW's recent cases include: *Arias v. Raimondo*, 860 F.3d 1185 (9th Cir. 2017); *Guerrero v. California Department of Corrections*, 119 F. Supp. 3d 1065 (N.D. Cal. 2015); *Ollier v. Sweetwater Union High School District*, 768 F.3d 843 (9th Cir. 2014); and *Willits v. City of Los Angeles*, 925 F. Supp. 2d 1089 (C.D. Cal. 2013).

Founded in 1968, the **Mexican American Legal Defense and Education Fund (MALDEF)** is the leading national civil rights organization representing the 55 million Latinos living in the United States through litigation, advocacy, and educational outreach. MALDEF's mission is to foster sound public policies, laws, and programs to safeguard the civil rights of Latinos living in the United States and to empower the Latino community to participate fully in our society. MALDEF has litigated many cases under state and federal law to ensure equal treatment of Latinos, including many class actions in the areas of education, employment, immigrant rights, and voting rights.

Since 1973, the **National LGBTQ Task Force** has worked to build power, take action, and create change to achieve freedom and justice for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people and

their families. As a progressive social justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all. Because LGBTQ and gender non-conforming people – especially LGBTQ/GNC people of color – face widespread systemic discrimination in employment, legal efforts to ensure that employees have access to collective action are a critical piece of our broader efforts to fight for economic justice.

The **National Women's Law Center (NWLC)** is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities. Since 1972, NWLC has fought for equal opportunities and fair treatment for women in all aspects of their employment. This includes not only the right to a workplace that is free from all forms of discrimination and harassment, but also access to effective means of enforcing that right and remedying such conduct. NWLC has played a leading role in the passage and enforcement of federal civil rights laws, including through class action and pattern or practice litigation and in numerous amicus briefs involving sex and race discrimination in employment before the United States Supreme Court, federal courts of appeals, and state courts.

Letitia James is the **Public Advocate for the City of New York** – the second-highest ranking official in New York City government who serves as a citywide elected ombudsman, legislator, and litigator. Public Advocate James has advocated for stronger

anti-discrimination legislation – including the introduction of legislation that prohibits New York City employers from asking job applicants about their salary histories. She has also filed amicus briefs in cases involving workplace discrimination on the basis of sexual orientation and criminal records, and she has issued policy reports on the gender wage gap in New York City and other topics relevant to workplace discrimination.

Public Advocates, Inc. is a non-profit, public interest law firm and one of the oldest public interest law firms in the nation. Public Advocates uses diverse litigation and non-litigative strategies to handle exclusively policy and impact cases to challenge the persistent, underlying causes and effects of poverty and discrimination. Its work currently focuses on achieving equality in education, housing, and transportation; in the past the organization has addressed systemic harms in employment, prisons, consumer rights, welfare benefits and health care among other issue areas. Throughout its history, Public Advocates has consistently employed the class action mechanism to obtain relief on behalf of large numbers of individuals – sometimes having had classes certified with over a million members. As such, the organization has a strong interest in the continued effective functioning of the class action mechanism in all contexts.

Public Counsel is the largest *pro bono* law firm in the nation and the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Its 71 attorneys and 50 support staff – along with over

5,000 volunteer lawyers, law students, and legal professionals – assist more than 30,000 low-income individuals, families, and community organizations every year. Public Counsel addresses systemic poverty and civil rights issues through impact litigation, direct services, and policy advocacy. Our practice areas include veterans' rights, children's rights, community development, consumers' rights, immigrants' rights, and housing and homelessness.

The **Public Interest Law Project (PILP)** is a nonprofit state support center for local legal services and nonprofit public interest law programs in California. PILP focuses on the areas of affordable housing and public benefits, including the areas of food, health care and income support. In all of those areas many of our clients are frequently employed at workplaces where concerted activity and collective legal action are often necessary to protect their civil and economics right and to assist with efforts to lift them out of poverty.

Public Justice is a nonprofit legal organization that participates in high-impact litigation throughout the United States on behalf of low-wage workers, consumers, and others whose civil rights have been violated. Public Justice's Class Action Preservation Project conducts research and comments on developments in the law with the goal of ensuring that those with relatively little societal power retain access to the civil justice system and are able to join together to vindicate their rights.

The **Public Justice Center (PJC)**, is a non-profit civil rights and anti-poverty legal services organization founded in 1985 and based in Baltimore, Maryland. The PJC has a longstanding commitment to protecting the rights of low- and moderate-income workers, consumers, and renters, among others, and routinely vindicates those rights through representation in class actions, including cases challenging discriminatory and unlawful labor practices.

Located in Montgomery, Alabama, **Southern Poverty Law Center (SPLC)** has provided pro bono representation to vulnerable populations in the Southeast since 1971. SPLC has litigated or served as amicus curiae in numerous cases to vindicate the rights of low wage workers, including several class actions challenging employment discrimination, retaliation, and human trafficking. SPLC has an interest in this case because a ruling upholding class action waivers in employment agreements would adversely impact SPLC's future clients.

APPENDIX B

List of Selected Civil Rights Concerted Actions

AGE DISCRIMINATION CASES

Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008); No. 1:97-cv-00012-DRH, Dkt. 312 (N.D.N.Y. May 1, 2009) (after trial, back pay)

Merritt v. Wellpoint, Inc., No. 3:08-cv-272, Dkts. 93, 101 (E.D. Va. Jun. 27, 2011) ($2.6 million)

Williams v. Sprint/United Mgmt. Co., 2007 WL 2694029 (D. Kan. Sept. 11, 2007) ($57 million for 1697 individuals)

DISABILITY DISCRIMINATION CASES

Bates v. UPS, No. C99-2216 THE, Dkt. 647 (N.D. Cal. Dec 13, 2010) (injunctive relief, $5.8 million for 1000 individuals)

Cookson v. NUMMI, No. C10-02931 CRB, Dkt. 68 (N.D. Cal. Jan. 27, 2012) ($6 million for 500 individuals)

Knee v. Henderson, 2001 WL 34395138 (M.D. Pa. 2001) ($2.4 million for 235 individuals)

GENDER DISCRIMINATION CASES

Amochaev v. Citigroup Global Mkts., 2007 WL 484778 (N.D. Cal. Aug. 13, 2008); *as described in Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090,

at *7 (N.D. Cal. Oct. 22. 2008) (injunctive relief, $33 million for 2400 women)

Augst-Johnson v. Morgan Stanley & Co., Inc., No. 1:06-cv-01142-CLL (D.D.C. Oct. 26, 2017) (injunctive relief, $46 million for 2800 women)

Aviles v. BAE Systems Norfolk Ship Repair, Inc., No. 2:13-cv-00418, Dkt. 111 (E.D. Va. Feb. 10, 2016); Dkt. 103-3 (injunctive relief, $3 million for 166 women)

Beavers v. Am. Cast Iron Pipe Co., 164 F. Supp. 2d 1290, 1296 (N.D. Ala. 2001) (injunctive relief, $5 million)

Beck v. Boeing Co., No. 2:00-cv-00301-MJP (W.D. Wash. Oct. 8, 2004) (injunctive relief, $72.5 million for 25,000 women)

Beckmann v. CBS Inc., No. 3:96-cv-01172, 2000 WL 33281052 (D. Minn. 2000) (injunctive relief, $8 million for 200 women)

Bellifemine v. Sanofi-Aventis U.S. LLC, 2010 WL 3119374 (S.D.N.Y. Aug. 6, 2010) (injunctive relief, $15.4 million)

Bouman v. Block, 940 F.2d 1211, 1226 (9th Cir. 1991) (after trial, injunctive relief)

Brown v. Medicis Pharm. Corp., No. 13-cv-1345, Dkt. 52 (D.D.C. July 11, 2016) (injunctive relief, $7.15 million for 225 women)

Bunch v. Rent-a-Center, 2001 WL 1712351 (W.D. Mo. 2001) (injunctive relief, $12.25 million for 4600 women)

Butler v. Home Depot, Inc., No. C-94-4335 SI (N.D. Cal.), https://www.clearinghouse.net/detail.php?id=9471 (injunctive relief, $87.5 million)

Calibuso v. Bank of Am. Corp., 299 F.R.D. 359 (E.D.N.Y. 2014) (injunctive relief, $39 million)

Card v. City of Cleveland, No. 1:08-cv-02325-DAP, Dkt. 39 (N.D. Ohio July 14, 2011) (back pay)

Carlson v. C.H. Robinson Worldwide, Inc., 2006 WL 2671105 (D. Minn. Sept. 18, 2005); https://www.clearinghouse.net/chDocs/public/EE-MN-0076-0002.pdf (injunctive relief, $15 million for 1800 individuals)

Coates v. Farmers Grp. Inc., 2016 WL 5791413 (N.D. Cal. Sept. 30, 2016) (injunctive relief, $4.1 million for 300 women)

Cronas v. Willis Group Holdings, Ltd., 2011 WL 6778490 (S.D.N.Y. Dec. 19, 2011) (injunctive relief, $11.6 million for 316 women)

Da Silva Moore v. Publicis Groupe SA, No. 11-cv-1279, Dkt. 618 (S.D.N.Y. May 20, 2016) ($2.9 million for 100 women)

Duling v. Gristede's Operating Corp., 2013 WL 3146772 (S.D.N.Y. June 19, 2013) (injunctive relief, $1.45 million for 600 women, plus fees)

Easterling v. State of Conn. Dep't of Corrections, 783 F. Supp. 2d 323 (D. Conn. 2011); No. 3:08-cv-826 (JCH) (D. Conn. 2013); http://www.clearinghouse.net/chDocs/public/EE-CT-0019-0003.pdf (summary judgment granted, injunctive relief, $1.8 million for 124 women, plus fees)

Ebbert v. Nassau Cty., 2011 WL 6826121, at *1 (E.D.N.Y. Dec. 22, 2011) (injunctive relief, $7 million)

Ellis v. Costco Wholesale Corp., 2014 WL 12641574 (N.D. Cal. May 27, 2014); https://www.clearinghouse.net/chDocs/public/EE-CA-0302-0009.pdf (injunctive relief, $8 million)

Estate of Pitre v. W. Elec. Co., Inc., 719 F. Supp. 966 (D. Kan. 1989); *aff'd in part, rev'd in part*, 975 F.2d 700 (10th Cir. 1992); *on remand* 1994 WL 132958 (D. Kan. Mar. 31, 1994) (after trial, $1 million for 80 women)

Hartman v. Powell, 2001 WL 410461 (D.C. Cir. Mar. 15, 2001) (injunctive relief, $531 million for 1100 women)

Hnot v. Willis Group Holdings Ltd., 2001 WL 36115583 (S.D.N.Y. July, 2001) (injunctive relief, $8.5 million for 180 women, plus fees)

Int'l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991); settlement reported (E.D. Wis. Jan. 19, 1994) https://www.clearinghouse.net/detail.php?id=10665&search=source%7Cgeneral%3BcaseName%7Cjohnson

%20controls%3BcaseCat%7CEE%3Borderby%7CfilingYear%3B (after Supreme Court ruling, back pay)

Jarvaise v. Rand Corp., 212 F.R.D. 1 (D.D.C. 2002); *Jarvaise v. Rand Corp.*, No. 1:96-cv-02680-RWR, Dkt. 253 (D.D.C., Dec. 18, 2007) (injunctive relief, $65/class member per month for 41 months)

Jensen v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993); *damages rulings vacated, remanded*, 130 F.3d 1287 (8th Cir. 1997) (after trial, injunctive relief, damages)

Kraszewski v. State Farm Gen. Ins. Co., 912 F.2d 1182, 1183 (9th Cir. 1990) (after trial, back pay)

Kyriazi v. W. Elec. Co., 647 F.2d 388 (3d Cir. 1981) (after trial, injunctive relief, back pay)

Martens v. Smith Barney, Inc., 181 F.R.D. 243 (S.D.N.Y. 1998); 1998 WL 1661385 (S.D.N.Y. July 28, 1998); https://www.clearinghouse.net/detail.php?id=10620&search=source%7Cgeneral%3BcaseName%7Csmith%20barney%3BcaseCat%7CEE%3Borderby%7CfilingYear%3B ($150 million for 20,000 women)

Orlowski v. Dominick's Finer Foods, Inc., 1999 WL 1823288 (N.D. Ill. 1999); https://www.clearinghouse.net/chDocs/public/EE-IL-0290-0001.pdf (injunctive relief, $7.65 million, plus fees)

Palmer v. Combined Ins. Co., No. 1:01-cv-09502, Dkts. 80, 111 (N.D. Ill. Jan. 12, 2005); https://www.

clearinghouse.net/chDocs/public/EE-IL-0284-0005.pdf; https://www.clearinghouse.net/chDocs/public/EE-IL-0284-0002.pdf (injunctive relief, $8.5 million)

Pan v. Qualcomm Inc., No. 3:16-cv-01885-JLS-DHB (S.D. Cal. July 31, 2017); https://scholar.google.com/scholar_case?case=27979207294598644 32&hl=en&as_sdt=6&as_vis=1&oi=scholarr (injunctive relief, $19.5 million for 3300 women)

Schaefer v. Tannian, 895 F. Supp. 175 (E.D. Mich. 1995) (after trial, injunctive relief, $10.8 million)

Shores v. Publix Super Mkts, Inc., 1997 WL 714787 (M.D. Fla. Jan. 27, 1997); https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1146&context=condec (injunctive relief, $63.5 million, plus fees)

Stagi v. Nat'l R.R. Passenger Corp., 880 F. Supp. 2d 564 (E.D. Pa. 2012) (injunctive relief, $1.99 million for 5400 women)

Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992); https://www.clearinghouse.net/chDocs/not_public/EE-CA-0276-0001.pdf (after trial, injunctive relief, $80 million)

Vasich v. City of Chicago, 2013 WL 6730106 (N.D. Ill. Dec. 20, 2013) (injunctive relief, $2 million)

Velez v. Novartis Pharm. Corp., 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010) (after trial, injunctive relief, $152.5 million for 6000 women)

Warnell v. Ford Motor Co., No. 98-C-1503, Dkt. 159 (N.D. Ill. Nov. 7, 2000); 2000 WL 33232272 (N.D. Ill. 2000) ($9 million plus fees)

Wellens v. Daiichi Sankyo, Inc., No. 3:13-cv-0058 (N.D. Cal. 2015) (injunctive relief, $8.2 million)

Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975) (after trial, back pay)

Womack v. Dolgencorp, No. 06-cv-465, Dkt. 214 (N.D. Ala. Apr. 6, 2012); http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1489&context=condec (injunctive relief, $18.75 million plus fees)

Women's Comm. For Equal Emp't Opportunity (WC=EO) v. Nat'l Broad. Co., 76 F.R.D. 173 (S.D.N.Y. 1977) (injunctive relief, $1.4 million plus fees)

RACE DISCRIMINATION CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (after trial, back pay)

Bert v. AK Steel Corp., 2008 WL 4693747 (S.D. Ohio Oct. 23, 2008) (injunctive relief, $3400 to each class member plus fees)

Brand v. Comcast Corp., No. 11-cv-8471 (N.D. Ill. June 15, 2016) (injunctive relief, $7.2 million for 385 individuals)

Brown v. Yellow Transp., No. 08-5908, Dkt. 181 (N.D. Ill. Sept. 25, 2012); https://www.clearinghouse.

net/chDocs/public/EE-IL-0329-0004.pdf (consent decree) ($11 million for 350 individuals)

Buttram v. UPS, 1999 U.S. Dist. LEXIS 23556 (N.D. Cal. Apr. 14, 1999) (injunctive relief, $12 million)

Cogdell v. Wet Seal, Inc., 2013 WL 12134045 (C.D. Cal. Dec. 9, 2013); http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1282&context=condec (injunctive relief, $7.5 million)

Cokely v. NY Convention Ctr., No. 00 Civ. 4637(CBM), Dkt. 150 (S.D.N.Y. Aug. 21, 2006); https://www.clearinghouse.net/chDocs/public/EE-NY-0205-0002.pdf (injunctive relief, $8.4 million)

Commonwealth of Pa. v. Local 542, Int'l Union of Operating Eng'rs, 1982 WL 770 (E.D. Pa. Dec. 15, 1982) (after trial, $1.5 million for 599 individuals)

Cook v. Howard Indus., Inc., 2013 WL 943664 (S.D. Miss. Mar. 11, 2013) ($3 million, plus fees)

Creighton v. Metro. Life Ins. Co., No. 1:15-cv-08321-WHP, Dkts. 101-1, 138 (S.D.N.Y. June 27, 2017) ($32.5 million)

Curtis-Bauer v. Morgan Stanley, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008) (injunctive relief, $16.5 million for 1300 individuals)

Davis v. Eastman Kodak Co., Nos. 04-CV-6098, 07-CV-6512, Dkt. 351 (W.D.N.Y. Sept. 3, 2010) (injunctive relief, $21.4 million for 3000 individuals)

Doe v. Mulcahy, Inc., No. 08-306, Dkt.156 (D. Minn. Jan. 11, 2010) (injunctive relief, $6 million)

Domingo v. NE Fish Co., 727 F.2d 1429 (9th Cir. 1984) (after trial, back pay)

Estrada v. Bashas', Inc., No. CIV 02-0591-DJH, Dkt. 360 (D. Ariz. April 24, 2015) ($6.5 million for 12,000 individuals)

Franks v. Bowman Transp., 424 U.S. 747 (1976) (after trial, back pay)

Gonzales v. Pritzker, No. 10-3105, Dkt. 377 (S.D.N.Y. Sept. 20, 2016); https://www.clearinghouse.net/chDocs/public/EE-NY-0254-0008.pdf; https://www.clearinghouse.net/chDocs/public/EE-NY-0254-0010.pdf (injunctive relief, $5 million)

Griggs v. Duke Power Co., 1972 WL 215, at *1 (M.D.N.C. Sept. 25, 1972) (after trial, injunctive relief)

Hammon v. Barry, 752 F. Supp. 1087, 1089 (D.D.C. 1990) (injunctive relief, $3.5 million for 180 individuals)

Haynes v. Shoney's, Inc., 1993 WL 19915 (N.D. Fla. Jan. 25, 1993) (injunctive relief, $105 million)

Hopson v. Mayor & City Council of Baltimore, No. CIV.A. AMD-04-3842, Dkt. 306 (D. Md. June 23, 2009) (injunctive relief, $2.5 million for 15 plaintiffs)

Huguley v. GM Corp., 128 F.R.D. 81, 82 (E.D. Mich. 1989), *aff'd*, 925 F.2d 1464 (6th Cir. 1991), *aff'd*, 999 F.2d 142 (6th Cir. 1993) (injunctive relief, $1.6 million)

Ingram v. Coca-Cola Co., 200 F.R.D. 685 (N.D. Ga. 2001) (injunctive relief, $38,000 per class member)

Jaffe v. Morgan Stanley & Co., No. 3:06-cv-03903-THE, Dkt. 249 (N.D. Cal. Oct. 22, 2008) (injunctive relief, $16 million for 1300 individuals)

James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977) (after trial, injunctive relief)

Kerner v. City of Denver, 2016 WL 3639937 (D. Colo. July 8, 2016) (after trial, $1.7 million)

Ketchum v. Sunoco, Inc., No. 2:01-cv-01042-CG, Dkt. 60 (E.D. Penn. Dec. 2, 2004); https://www.clearinghouse.net/chDocs/public/EE-PA-0202-0003.pdf; https://www.clearinghouse.net/chDocs/public/EE-PA-0202-0002.pdf (injunctive relief, $5.5 million for 200 individuals)

Kirkland v. NY State Dep't of Corr. Servs., 711 F.2d 1117, 1121 (2d Cir. 1983) (injunctive relief)

Latino Officers Ass'n City of N.Y., Inc. v. City of N.Y., 2004 WL 2066605 (S.D.N.Y. Sept. 15, 2004) (injunctive relief, $20 million)

Leonard v. Southtec, LLC, No. 3:04-0072, Dkt. 96 (M.D. Tenn. May 15, 2007); https://www.clearinghouse.net/chDocs/public/EE-TN-0141-0002.pdf; https://www.clearinghouse.net/chDocs/public/EE-TN-0141-0003.pdf (injunctive relief, $900,000 for 500 individuals)

Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983); 842 F.2d 1496 (4th Cir. 1988) (after trial, back pay)

Lurns v. Russell Corp., 604 F. Supp. 1335 (M.D. Ala. 1984) (injunctive relief, $250,000)

McClain v. Lufkin Indus., Inc., 649 F.3d 374 (5th Cir. Aug. 8, 2011) (after trial, injunctive relief, $5.5 million, plus fees)

McReynolds v. Merrill Lynch, No. 1:05-cv-06583, Dkt. 616 (N.D. Ill. Dec. 6, 2013); https://www.clearinghouse.net/chDocs/public/EE-IL-0282-0002.pdf; https://www.clearinghouse.net/chDocs/public/EE-IL-0282-0005.pdf (injunctive relief, $160 million for 700 individuals)

McReynolds v. Sodexho Marriott Servs., Inc., No. 1:01-cv-00510-ESH, Dkt. 312 (D.D.C. Aug. 10, 2005); https://www.clearinghouse.net/chDocs/public/EE-DC-0034-0001.pdf (injunctive relief, $80 million)

Middleton v. Publix Supermarkets Inc., 2000 WL 34248105 (M.D. Fla. 2000); https://www.clearinghouse.net/chDocs/public/EE-FL-0155-0003.pdf; https://www.clearinghouse.net/chDocs/public/EE-FL-0155-0002.pdf (injunctive relief, $10.5 million)

Moore v. Johnson, No. 1:00-cv-00953, Dkt. 845 (D.D.C. May 3, 2017); https://www.clearinghouse.net/chDocs/public/EE-DC-0043-0024.pdf; https://www.clearinghouse.net/chDocs/public/EE-DC-0043-0026.pdf (injunctive relief, $24 million for 114 individuals)

Moore v. Norfolk S. Corp., 2000 WL 33951131 (N.D. Ala. 2000); https://www.clearinghouse.net/chDocs/public/EE-AL-0118-0002.pdf; https://www.clearinghouse.net/

chDocs/public/EE-AL-0118-0003.pdf (injunctive relief, $29 million for 7700 individuals)

NAACP. v. N. Hudson Reg. Fire & Rescue, 665 F.3d 464 (3d Cir. 2011) (after trial, injunctive relief)

Nelson v. Wal-Mart Stores, 2009 WL 2486888 (D. Ark. Aug. 12, 2009); https://www.clearinghouse.net/chDocs/public/EE-AR-0062-0002.pdf (injunctive relief, $17.7 million)

Newsome v. Up-to-date Laundry, No. 1:01-cv-02257-WDQ, Dkt. 99 (D. Md. Nov. 23, 2004); https://www.clearinghouse.net/chDocs/public/EE-MD-0138-0006.pdf (consent decree) (injunctive relief, $1.8 million)

Owolabi v. Nw. Airlines, 2002 WL 31415000 (N.D. Ga. 2002) ($14.4 million)

Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); *Pettway v. Am. Cast Iron Pipe Co.*, 681 F.2d 1259 (11th Cir. 1982); *Pettway v. Am. Cast Iron Pipe Co.*, 721 F.2d 315 (11th Cir. 1983) (after trial, injunctive relief, back pay)

Port Auth. Police Asian Jade Society of N.Y., N.J., Inc. v. Port Auth. of N.Y. & N.J., 2010 WL 132349 (S.D.N.Y. Jan. 4, 2010) (after trial, back pay for 7 plaintiffs, plus fees)

Reed v. Dresser, Inc., No. 08-C-0818 (E.D. Wis. Sept. 23, 2010) ($950,000)

Roberts v. Texaco, Inc., 1997 U.S. Dist. LEXIS 23848 (S.D.N.Y. Mar. 21, 1997); https://www.clearinghouse.net/chDocs/public/EE-NY-0165-0003.pdf (injunctive relief, $115 million for 1350 individuals)

Royal v. Aramark Corp., 1999 WL 1823282 (E.D. Pa. 1999) ($3.75 million for 268 individuals)

Satchell v. FedEx Corp., 2007 WL 1114010 (N.D. Cal. Apr. 13, 2007); https://www.clearinghouse.net/chDocs/public/EE-CA-0288-0019.pdf; https://www.clearinghouse.net/chDocs/public/EE-CA-0288-0016.pdf (injunctive relief, $53.5 million)

Sheppard v. Consol. Edison Co. of New York, 2002 WL 2003206 (E.D.N.Y. Aug. 1, 2002) (injunctive relief, $6.745 million)

Shipes v. Trinity Indus., 987 F.2d 311 (5th Cir. 1993) (after trial, back pay)

Slaughter v. Wells Fargo Advisors, No. 1:13-cv-06368 (N.D. Ill. 2016); http://www.wfafinancialadvisorracesettlement.com/media/795056/slaughter_v_wfa_-_amended_settlement_agreement.pdf (settlment agreement) ($35.5 million for 500 individuals)

Sledge v. J.P. Stevens & Co., 1980 WL 236 (E.D.N.C. Apr. 4, 1980); 1989 WL 90562 (E.D.N.C. Feb. 23, 1989) (after trial, injunctive relief, back pay)

Smith v. Nike Retail Servs., 2007 WL 2590363 (N.D. Ill. Jul. 30, 2007); Dkts. 186-187 (N.D. Ill. Oct. 2, 2007) (injunctive relief, $7.6 million for 230 individuals)

Stewart v. Rubin, 948 F. Supp. 1077 (D.D.C. 1996), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997) (injunctive relief, $4.7 million for 245 individuals)

Taylor v. DC Water & Sewer Auth., No. 1:01-cv-00561-BJR, Dkt. 255, (D.D.C. Mar. 28, 2013); https://www.clearinghouse.net/chDocs/public/EE-DC-0032-0012.pdf (injunctive relief, $2.9 million for 1000 individuals)

Tucker v. Walgreen Co., (S.D. Ill, Mar. 24, 2008); https://www.clearinghouse.net/chDocs/public/EE-IL-0258-0007.pdf (injunctive relief, $24.4 million for 10,000 individuals)

Turnley v. Banc of America Inv. Servs., No. 07cv10949–NG, Dkt. 148 (D. Mass. Nov. 18, 2009); https://www.clearinghouse.net/chDocs/public/EE-MA-0021-0003.pdf; https://www.clearinghouse.net/chDocs/public/EE-MA-0021-0004.pdf (injunctive relief, $7.2 million for 500 individuals)

United States v. City of New York, 717 F.3d 72 (2d Cir. 2013); 2013 WL 2458471 (E.D.N.Y. June 3, 2013) (after trial, injunctive relief, back pay)

Vines v. Covelli Enters., 2012 WL 5992114 (W.D. Pa. Nov. 30, 2012); Dkt. 30 (W.D. Pa. Dec. 14, 2012) ($0.70 per hour for each hour worked by class member)

Wade v. Kroger Co., 2008 WL 4999171 (W.D. Ky. Nov. 20, 2008) (injunctive relief, $16 million)

Warren v. Xerox Corp., 2008 WL 4371367 (E.D.N.Y. Sept. 19, 2008) (injunctive relief, $12 million for 1500 individuals)

Waters v. Cook's Pest Control, 2012 WL 2923542 (N.D. Ala. July 17, 2012) (injunctive relief, $2.5 million)

Williams v. Weirton Steel Div. of Nat'l Steel Corp., 1983 WL 30395 (N.D. W.Va. Feb. 28, 1983) (injunctive relief, $1.4 million)

Wright v. Stern, 553 F. Supp. 2d 337 (S.D.N.Y. 2008) (injunctive relief, $21 million for 3500 individuals)

Wynne v. McCormick & Schmick's Seafood Rests., No. C06-3153, Dkt. 113 (N.D. Cal. Aug. 8, 2008); https://www.clearinghouse.net/chDocs/public/EE-CA-0305-0004.pdf (injunctive relief, $2.1 million)

RACE, GENDER DISCRIMINATION CASES

Alaniz v. California Processors, Inc., 73 F.R.D. 269 (N.D. Cal. 1976) (injunctive relief, $5 million settlement)

Dorman v. Winn-Dixie Stores Inc., 1999 WL 33486606 (M.D. Fla. 1999); https://www.clearinghouse.net/chDocs/public/EE-FL-0157-0003.pdf (injunctive relief, $32.9 million)

Holloway v. Best Buy, No. 05-cv-5056 (N.D. Cal. Nov. 9, 2011); https://www.clearinghouse.net/chDocs/public/EE-CA-0307-0006.pdf (injunctive relief)

Longmire v. Regents of the Univ. of Ca., 2004 WL 5201788 (N.D. Ohio 2004) ($12 million)

SEXUAL ORIENTATION DISCRIMINATION CASES

Cote v. Wal-Mart Stores, Inc., No. 1:15-cv-12945-WGY, Dkt. 83 (D. Mass. May 16, 2017) (injunctive relief, $7.5 million)